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EMPLOYMENT TRIBUNALS

Claimant: **Mr D Tucker**

Respondent: **Phelan Construction Ltd**

Heard at: **East London Hearing Centre**

On: **4 & 5 July and in chambers on 30 - 31 July 2018**

Before: **Employment Judge C Hyde**

Members: **Mr T Burrows**
Dr J Ukemenam

Representation

Claimant: Mr T Brown (Counsel)

Respondent: Mr P Taheri (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that: -

(1) By consent it was declared that the Respondent unlawfully deducted the sum of £2,119.26 from the Claimant's wages in respect of a salary increase from January 2017.

(2) No order was made for the repayment of this sum, as this had already been done.

RESERVED JUDGMENT

(3) The claim of unlawful deduction of wages in respect of the bonus for the year ending 2016 and similar claims in respect of the bonus for the year

to the Claimant's termination (2017) were not well founded and were dismissed.

(4) Breach of contract claims in respect of the bonus for the year to the Claimant's termination (2017) were not well founded and were dismissed.

(5) The alternative claim of breach of contract in respect of the bonus for the year ending 2016 was well founded. The Respondent was ordered to pay to the Claimant the sum of **£4,412.26 net** forthwith.

(6) The application for a declaration in relation to breach of contract by the Respondent in respect of breaches of the disciplinary procedure was dismissed.

(7) The indirect disability discrimination complaints under section 19 of the Equality Act 2010 were not well founded and were dismissed.

(8) The direct disability discrimination complaint under section 13 of the Equality Act 2010 in respect of the termination of the employment was not well founded and was dismissed.

REASONS

1 Reasons are provided in writing as the judgment was reserved. Reasons are provided only to the extent that the Tribunal considers it is necessary to do so in order for the parties to understand why they have won or lost. Further, reasons are only provided to the extent that it is proportionate to do so.

2 All findings of fact were reached on the balance of probabilities.

Preliminaries

3 By a claim form which was presented on 8 January 2018, the Claimant complained that he had been subjected to unlawful deductions from wages and also that he had been subjected to disability discrimination under the Equality Act 2010. Further, the Tribunal gave the Claimant leave on the first day of the hearing to add a complaint about unlawful deductions of wages in respect of the bonus for the years 2016 and 2017 as an alternative to the breach of contract complaints. The amendment which the Tribunal granted was set out in a document which was at pages 63C-63R in the bundle.

4 In the usual course of preparation, case management orders were made by the Tribunal and sent to the parties on 8 March 2018 (p.51). Further, a Closed Preliminary Hearing took place with appearances by the representatives by telephone before Employment Judge Reid sitting alone on 9 April 2018. The Case Management Summary was sent to the parties on 11 April 2018 (pp.58-59).

5 By the date of the Preliminary Hearing the parties had agreed a draft list of

issues. Further amendments were made to that list of issues and an agreed list of issues was presented to the Tribunal at the commencement of the hearing on 4 July 2018. The agreed list of issues appeared at pp.60-63 of the bundle.

6 At the end of the Preliminary Hearing the Respondent's representative, Ms Robinson, was directed to send an updated list to the Tribunal, including the further issues considered at that hearing. The amended list was then sent by the Respondent's representative and was dated 13 April 2018 as referred to above. The point about the Claimant's comparator in relation to issue C11 being a hypothetical comparator only was not incorporated. However, this had been confirmed at the Preliminary Hearing.

7 Further, in respect of the indirect disability discrimination claim, issue 17 was to be amended to reinsert the matters which had been included in the previous version of the list of issues attached to an email dated 29 March 2018. There was no further discussion about this and no objection was raised at the hearing by either party when the Tribunal confirmed that the list of issues was as set out in the document in the bundle.

8 At the commencement of the hearing in July 2018 it was agreed that the Respondent had failed to pay the Claimant the full amount of a pay increase. This was calculated in respect of the period from January 2017 to the date of termination which was 20 September 2017. The figure was agreed as £2,119.26. It was also agreed that the Tribunal would make a declaration announcing that that sum had been unlawfully deducted from the Claimant's wages. It was unnecessary to make an order requiring the Respondent to pay that sum to the Claimant since by this date the sum had been repaid to the Claimant.

Evidence adduced

9 The parties agreed on a bundle of documents containing relevant evidence which was marked [R1] and which consisted of approximately 400 pages. Further the Respondent had prepared a chronology of events which was marked [R2]. In addition, as directed, the parties had prepared a cast list which the Tribunal marked [R3].

10 The Claimant gave evidence first and his evidence in chief was by way of a witness statement marked [C1]. In support he called a witness called Mr T Hummerstone, a former colleague, who relied on a witness statement marked [C2].

11 The Claimant also prepared a cast list and chronology in a combined document which the Tribunal subsequently numbered [C3].

12 On behalf of the Respondent Mr Neil Coy gave evidence and he relied on a witness statement marked [R4]. Mr Steven Tucker also gave evidence on behalf of the Respondent. His statement was marked [R5].

Findings of fact, issues and conclusions

13 The Tribunal does not set out the issues in a block but repeats them in context in relation to our findings of fact and conclusions.

14 Mr Daniel Tucker was employed from 8 August 2016 by the Respondent which is a construction firm operating on a national and regional level. The commencement of the Claimant's employment on 8 August 2016 was preceded by negotiations between himself and Mr Neil Coy, who was Commercial Director of the Respondent until December 2016. Thereafter Mr Coy was Managing Director of the Respondent.

15 The main documents which were created by the parties as part of this process and which we had to consider in order to determine the contractual position in respect of the payment of the bonus were the offer letter sent to the Claimant dated 27 May 2016 (pp.77-80) and subsequent emails between the parties and in particular emails on 13 June 2016 (pp.85-87).

16 Prior to the commencement of the Claimant's employment in 2016, he had been approached by the Respondent with a view to joining their workforce (by Mr Coy) in 2014. There was no dispute that the Claimant had initially accepted a role as a Quantity Surveyor within the Respondent in 2014 but subsequently declined it.

17 In early 2016 the Respondent, this time through Mr Steven Tucker, reached out to the Claimant again and this led to an interview with the Claimant on 14 March 2016.

18 Mr Steve Tucker was Commercial Manager of the Respondent at all material times. It was also not in dispute that the company had two distinct divisions, namely National Projects and Special Projects. The Claimant was recruited in 2016 to work in Phelan's Special Projects Division ("PSP").

19 The correspondence between the Claimant and Mr Coy started with a letter sent on 27 May 2016 (p.77). Mr Coy told the Claimant that the focus was obviously on the future transition to commercial lead for the Respondent's Special Projects Division:

> "beginning as a QS to learn our systems and processes and then taking on the management of others thereafter".

He then referred to having devised a bonus scheme:

> "that I believe could be very advantageous to you, based upon the performance of the division. I hope that you can see the relative merits of this if you are successful in what we intend to achieve for Special Projects growth and profitability."

20 The attached substantive letter confirmed among other matters: -

20.1 that the Claimant would be on a trial period of up to six months and that after successful completion of that period his position would become permanent;

20.2 that his starting pay would be £55,000 a year;

20.3 that in respect of the Claimant's "transition to Senior Quantity Surveyor for Special Projects and thereafter to Commercial Lead", there would be

additional pay increases of £5,000 per annum for attainment of these positions, subject to successful review and achievement of agreed targets;

20.4 that in addition to his salary, the company operated a profit sharing scheme which the Claimant would be eligible to join immediately and that payment would be made pro rata to his service in the first year;

20.5 that once the Claimant's transition to the Commercial Lead had been achieved, he would cease to be a member of the staff bonus scheme and instead his bonus would become linked to the performance of the Special Projects Division; and

20.6 the bonus would be calculated upon 1.5% of net margin (uncapped) in the year for the division.

21 The letter referred at several stages to a process by which the Claimant would take on or transition to more of a leadership role in the business.

22 In the hearing this was the subject of considerable debate. The Tribunal considered that the Respondent could have been clearer about communicating to the Claimant what stage he had reached in this process of transition throughout his employment.

23 There was a further enquiry by the Claimant to Mr Coy (p.81) by email on 1 June 2016 in which he asked more questions about the transition and the likely period that it would take for him to go from joining as a Quantity Surveyor to becoming the Commercial Lead.

24 On the evidence before us, it appeared to be settled within the surveying profession that the role of Quantity Surveyor was less senior to and distinct from the role of Senior Quantity Surveyor. The parties also acknowledged that the role of Senior Quantity Surveyor was different from Commercial Lead.

25 Mr Coy responded to the Claimant's enquiry by email on 6 June 2016. He gave a time frame of between 3 to 6 months for the transition to Senior Quantity Surveyor, and six months to one year for the transition to Commercial Lead. He continued that there was no set time for this to happen and that the time would be right when both Mr Coy and the Claimant were "comfortable with the change".

26 Mr Coy appears to have acknowledged indirectly that equal opportunities were not being observed when he referred in this email to the fact that he had "other staff to consider". The Tribunal considered that part of the difficulty that the Respondent found themselves in was due to the agreement to progress one particular member of staff through various promotions without that member of staff at any stage having to compete with others who might have wished to apply.

27 It was further not in dispute that the Claimant gave up a more highly paid job to take up the position with the Respondent. He made this point to the Respondent in an email dated 13 June 2016 (p.86). He made it absolutely clear that the prospective drop

in salary was: “still a bit of an issue” for him when looking at his monthly outgoings. He indicated that it was the only issue that was still stalling his decision about whether to accept the post offered by the Respondent. In answer to this query and the sharing of this reservation by the Claimant Mr Coy responded (p.86) also on 13 June 2016 inter alia in the following terms:

> “With regard to the drop in salary – I understand that this represents short-term pain for you but the long term gain is much better. To help, we could kick off the profit related pay element as soon as you start as I have faith that you would achieve the targets. The current turnover is already projected to be £15m by the end of 2016. You would have some influence on the margin outcome and so I believe that there is a fair sum already available to you? I can make the first payment in December to make up the shortfall in monthly payments?
>
> We are keen to welcome you here Dan, what more can I do to make it happen?!”

28 Mr Daniel Tucker responded later that evening also by email. The email exchange dealt with an issue about holiday but that was not the subject of dispute in the Tribunal. He then responded in relation to the issue of the profit related pay as follows:

> “Thank you for confirming the profit related payment in December, it is really appreciated that you have added this in to the package. I am now happy to formally accept your offer & I look forward to joining the team.”

29 Mr Coy responded enthusiastically the next day by greeting this as: “the best news I have received this year!” He shared with Mr Coy that he was going to advertise this now to the rest of the business immediately and make preparations for Mr Tucker’s arrival. He did not contradict the terms of the Claimant’s email above.

30 Also, the written contract which the Claimant signed (pp.95-98) was amended by him to expressly incorporate the emails between himself and Mr Coy on 13 June 2016. The copy that the Tribunal had however had not been completed by the Respondent.

31 It was not in dispute that the difference between the Claimant’s old and new salaries was £1,000 per month. The Tribunal was satisfied that the Respondent had offered extra payment to bridge the gap between the Claimant’s old and new salaries by effectively guaranteeing a bonus payment to the Claimant in the sum of £1,000 to be paid by the end of 2016. The Tribunal considered that Mr Coy could have been in no doubt whatsoever that the Claimant would rely on that assurance and in the event, as the Claimant made clear in his email in response, he did so. The Claimant therefore put himself at a detriment in reliance on the Respondent’s express promise and the Tribunal saw no reason whatsoever why the Respondent should not then be bound by that promise. By offering the Claimant the benefit of the profit related element bonus in 2016, Mr Coy was offering to accelerate a benefit which had not previously been anticipated for the Claimant until a later stage of his employment.

32 The Tribunal distinguished however between the bonus due at the end of 2016

and the bonus due at the end of 2017. It was clear that Mr Coy was putting this forward as a bridging arrangement and that it expressly related only to the end of 2016.

33 In the original list of issues, this claim was put as an unlawful deduction from wages, and an issue arose for the Tribunal as to whether the claim was brought out of time. However, given that the Tribunal allowed the amendment and that this claim was put in the alternative as a breach of contract claim, time runs in respect of such claims from the date of termination of the employment. There was no suggestion that as a breach of contract claim it was out of time.

34 Thus, as an unlawful deduction of wages claim, the claim in respect of the 2016 bonus payment was presented out of time and the Tribunal dismissed it. There were no grounds put forward to suggest that it had not been reasonably practicable for the claim to have been brought as an unlawful deduction of wages claim within three months of the date of the deduction. As a breach of contract claim however it survived as time only ran from the date of dismissal.

35 The period from the commencement of the Claimant's employment until the end of December 2016 was just less than five full months. The Tribunal adopted the calculation in paragraph 61 of the Claimant's closing submissions in calculating the amount due. In the event Mr Coy or the Respondent paid to the Claimant £1,000 gross without any explanation; £5,000 net should have been paid in December 2016. The £1,000 which was paid gross was equivalent to a net payment of £587.41. Therefore, for the period in question the Claimant's net loss was £5,000 minus £587.74 = £4,412.26.

36 The next stage of the claim for the bonus in 2017 was that the promise that Mr Coy made effectively continued and should cover the period 1 January 2017 to 4 October 2017. 4 October 2017 was the date on which the Claimant argued his notice of termination would have expired if it had been given. He therefore contended that he was entitled to receive a further £9,000 net by way of profit related pay.

37 The Tribunal did not construe Mr Coy's offer in these terms. When the offer was made by him in the email of 13 June 2016 (p.86) it was quite clear, the Tribunal found, that the profit related pay would be dependent on the Claimant's achieving of targets. The Tribunal considered that the Respondent committed itself to underwriting the drop in the Claimant's pay for the first five months or so up to the end of 2016. Among other matters we found that Mr Coy who, as far as the Claimant was concerned, would be in a good position to know this, expressly represented to the Claimant that the current turnover was already projected to be 15 million by the end of 2016.

38 No representations were made by Mr Coy about the position in respect of 2017. The Tribunal also noted that in his express acceptance of this Mr Tucker thanked Mr Coy for confirming "the profit related payment in December".

39 When the Claimant was originally told about the bonus scheme in an email dated 27 May 2018, he was told that it was "based upon the performance of the division" (p.77). In the attached more detailed letter of the same date, (top paragraph of the offer letter on page 79), Mr Coy distinguished between the Claimant benefiting from the bonus which was linked to the performance of the Special Products Division in

which it was anticipated that the Claimant would be making a significant contribution , once he had transitioned to being the Commercial Lead, and the staff bonus scheme which was not linked so directly to the performance of the SPS Division (p78), but which he was entitled to join immediately.

40 In relation to the 2016 payment, the Respondent's argument was that under the profit related pay scheme and looking at the performance of the Special Products Division, the Claimant would not have been entitled to a bonus of the sort that he was claiming because the division did not make a profit.

41 We found that Mr Coy had promised to make up the shortfall in the Claimant's old job and new job salary between the date of joining and December 2016. The eventual profitability of the division was not relevant therefore to this time frame. Mr Coy had represented to the Claimant that it was profitable as set out above, and the Claimant had acted to his detriment in reliance of that assurance, and to the Respondent's knowledge.

42 As stated above, at paragraph 62 of Mr Brown's closing submission he contended that the Claimant was making a claim for bonus from 1 January 2017 to 4 October 2017. The latter date set out was different however from the date in the list of issues which referred in this context to 23 October 2017. There was no dispute that the Claimant was given notice of termination of employment on 20 September 2017 (p.308). The Tribunal checked that the contract of employment signed by the Claimant on 23 August 2016 (p.98) provided that the relevant period of notice by the employer for this period of service was two weeks. The Tribunal considered that this accounted for Mr Brown amending the date to 4 October 2017 in his closing submissions as that represented a period of two weeks after 20 September 2017.

43 Our position in respect of the 2017 bonus claim was that there was some justification for the Claimant's argument that in the June 2016 emails Mr Coy promised the Claimant that he would be put on to the divisional bonus scheme which the Respondent had originally intended should only kick in when he became Commercial Lead, on an accelerated basis. We found that in relation to the period up to December 2016, Mr Coy committed the Respondent to protecting the Claimant from any drop in pay in the sum of £1,000 per month. Thereafter however from the beginning of 2017 we found the Claimant was entitled only to such bonus as the terms of the divisional bonus yielded him.

44 We had no evidence to contradict the evidence of the Respondent's witnesses as to the financial performance of the division. This was set out in paragraphs 16 and 17 of Mr Coy's witness statement read with pages 383 and 385 of the bundle.

45 These documents showed that there was a loss in 2016 for the Claimant's division of £148,930. At this point it was not in dispute that the Respondent paid to the Claimant the sum of £1,000 in respect of bonus but no explanation was given to the Claimant about this at the time by either Mr Coy or anyone else on behalf of the Respondent as to how this sum had been calculated. The payslip (p.99) simply carried the description "BONUS" next to the payment of £1,000 gross.

46 The Claimant did not immediately chase up any larger sum for the bonus or query the amount that he had been paid. We did not treat this as some sort of acquiescence by the Claimant. We considered that he was still in effect serving his probation at this time. When he subsequently queried what he saw as a failure to provide the increase in his pay, this was ignored by the Respondent. He did not then pursue the matter further.

47 In relation to 2017, the Claimant challenged the figures used for the overheads by the Respondent in calculating bonus entitlement. In effect those figures meant that there was no profit at the material time.

48 Whilst the Claimant challenged these figures there were no alternative figures put forward and the Tribunal could only on the balance of probabilities accept the figures put forward by the Respondent. We also took into account the submission by the Respondent that the overhead figures produced were those used by the Respondent's financial accountant and were broadly consistent with the figures quoted to the Claimant on 31 March 2017 (p.386) during his employment. There was no evidence that those figures were challenged by the Claimant at or about the time of the email.

49 There was therefore no proper basis for the Tribunal to consider that there was some further entitlement to a bonus in respect of 2017.

50 In any event, there was also an issue as to whether the Claimant would have been entitled to a bonus given that his employment ended part way through the relevant year. This argument was to a certain extent academic because as we found above, on the figures made available to us it did not appear that there would have been a profit shown which would have yielded entitlement to bonus in any event based on the division's performance.

51 The remaining breach of contract issue was at paragraph 2(b) of the Claimant's written closing submissions, namely that the Claimant sought a declaration that there had been a breach of contract by breaching the disciplinary procedure, in respect of the handling of the issues which purportedly led to the Claimant's summary dismissal. The submissions in relation to this matter were at paragraphs 49-55 of Mr Brown's written closing submissions. The Tribunal queried whether it had the jurisdiction to make a declaration in respect of such a breach of contract.

52 There was no dispute that the Claimant had been paid two weeks pay in lieu of notice. Thus, even if the Respondent had acted in breach of contract by terminating the employment summarily, the remedy of damages for breach of contract in respect of the notice pay would not be available in the circumstances.

53 Furthermore, the Tribunal did not consider that the Extension of Jurisdiction Order (England and Wales) 1994 at Article 3 gave us the power to make such a declaration. It expressly provided that the claim by the employee for which the jurisdiction was being extended was a claim "for the recovery of damages or any other sum …". There was no reference to remedies such as declarations or orders for specific performance etc. The Tribunal considered therefore that this remedy was outwith our jurisdiction.

54 In any event it appeared to the Tribunal that any points that were being made in relation to either breaches of procedure by the Respondent or criticisms of the way in which they went about the termination of the Claimant's employment were relevant to the discrimination complaints and to divining the motive of the Respondent.

55 Indeed, in paragraph 55 of his submissions Mr Brown indicated that the circumstances of the alleged breaches of the procedure were relevant aggravating features in computing damages for injury to Mr Tucker's feelings as a result of the discrimination which he experienced. The Tribunal considered that that was the only possible relevance of such findings.

Discrimination Allegations

56 The Tribunal then moved on to consider the discrimination allegations. There were essentially two allegations about two categories of treatment. The first was that the Respondent had failed to promote Mr Tucker to Commercial Lead and that this constituted direct and/or indirect disability discrimination by association; and the second was that the dismissal of the Claimant also constituted either direct or indirect disability discrimination by association.

57 The legal framework was set out in helpful detail by Mr Brown in paragraphs 6-24 inclusive of the closing submissions dated 13 July 2018. In his closing submissions Mr Taheri referred to the relevant statutory provisions and the case law also. As there was no difference in our view in the parties' respective contentions as to the applicable law and as they were set out in varying detail in their respective written submissions, the Tribunal did not consider it proportionate to repeat the applicable legal provisions here.

58 The Tribunal considered that it was appropriate to make a determination on the ability in law of the Claimant to bring a complaint of associated disability discrimination in respect of indirect disability discrimination. The initial source of law in support of this concept was the case of *Coleman v Attridge Law* [2008] ICR 1128 paragraphs 38. This was a judgement of the CJEU (ECJ).

59 There was no dispute that the Claimant could bring a claim of associative discrimination in respect of direct disability discrimination. There was no dispute that the *Coleman v Attridge Law* case read with the General Framework Directive (2000/78/EC) had this effect. The issue that was in dispute was whether claims beyond those of direct discrimination could be brought.

60 The Tribunal cited its own reasoning in the case of *Haslam v London Borough of Waltham Forest* (Employment Tribunal at first instance case number 3200580/2016 on 13 October 2017) in support of our view that having regard to the case of *CHEZ Razpredelenie Bulgaria* AD [2015] 746, a complaint of associative indirect disability discrimination could not be brought. There was no appellate judgment domestically following the case of *CHEZ* which dealt with this issue.

61 For those reasons the Tribunal rejected the argument that it had jurisdiction to determine complaints under section 19 of the Equality Act 2010 of indirect disability

discrimination by association. Those claims were therefore not well founded and were dismissed.

62 The Tribunal then moved to consider the allegations in relation to the dismissal of the Claimant, namely that it was an act of direct disability discrimination by association. The alternative case was that it constituted indirect discrimination, but as the Tribunal concluded that there was no valid legal basis for bringing an indirect discrimination by association complaint, we proceeded to consider the direct disability by association complaint in relation to the dismissal.

63 The evidence as to the justification for the dismissal was only relevant to the Tribunal's determination whether this was the genuine reason for the dismissal. It was not relevant whether the reason was justified or reasonable because in a discrimination complaint the issue is not whether it is a fair or a justified decision but whether it is genuinely the reason, and then whether it was discriminatory.

64 The Respondent relied on concerns about the Claimant's performance as the reason for the dismissal and they also argued that their concerns had existed prior to the birth of the baby and certainly prior to any knowledge about the degree of disability of the Claimant's new baby.

65 The Claimant's baby was born on 31 May 2017. Sadly, she passed away due to ill health in December 2017.

66 By an email dated 3 February 2017, the Claimant wrote to Mr Coy reminding him that the approaching Wednesday marked six months of employment with the Respondent. He asked Mr Coy if they could arrange a meeting to discuss progress to date, the plan/vision for PSP going forward, his own position and job title etc.

67 The meeting appears to have taken place on 22 February 2017 (p.205). There was an undated handwritten note in the bundle (p180) which was said to be Mr Stephen Tucker's note of the issues discussed at the meeting. It was not shared with the Claimant at the time. The only contemporaneous record of what was discussed shared with both parties, was an email dated 2 March 2017 from the Claimant to Mr Coy and copied to Mr Steve Tucker who was also at the appraisal/six-month review meeting (p.205). Mr Dan Tucker wrote to Mr Coy and Mr S Tucker and set out what he understood to be the four targets set for the following month further to the review on 22 February. These were: -

67.1 Recruitment of a QS/Senior QS. The Claimant informed them that a candidate had been interviewed on 28 February 2017, and the second meeting and office visit were to be arranged with Mr Steve Tucker shortly. He also reported that a further candidate was being interviewed on 2 March.

67.2 The structure was discussed and agreed as per an attached document. He stated that apart from the vacancy he had referred to above, no further recruitment was required for the rest of 2017 unless a large amount of work came in.

67.3 Systems - He indicated that he was unsure what the action was in relation to this.

67.4 His personal development plan - He noted that Steve Tucker was to arrange a convenient date and time to do some 1-to-1 training/planning.

68 The headings and content of this email were substantially the same as appeared in Mr Steve Tucker's note (p180). The note was briefer, but, inter alia, had subject headings "Salary" and "Pay Review", which did not appear in the later email.

69 In an email sent on 8 March 2017 Mr Steve Tucker he responded to the Claimant's email, and copied in Mr Neil Coy. He stated that he had put a provisional date in the diary for them to "collectively review the action points with Neil". He also asked if the Claimant and he could meet the week before to review these in more detail along with 'systems' which he stated was for the Claimant to demonstrate that he was embracing the Phelan culture and using the systems that they had in place. He suggested that they could use the session to work through one of Mr Dan Tucker's projects against the process map.

70 It appeared to the Tribunal that Mr Steve Tucker and Mr Coy were expressing concerns about the Claimant's performance certainly in relation to systems by this date.

71 The further review meeting then took place on 28 March 2017. After that meeting Mr Steve Tucker wrote to the Claimant and copied the email dated 6 April 2017 (p.228) to Mr Coy who was referred to in the text of the email by the initials "NIC". He stated as follows: -

"1. Given you are a de facto Senior Surveyor, your stage 1 salary increase will be sanctioned and back dated to 01 January 2017 (NIC to action).

2. To 'elevate' yourself and step in to the role of Manager, the recruitment of an additional surveyor is required. This is to be 'the right' person who will provide a long term solution, not a 'quick fix'.

3. We need to draw a line on all of the 'legacy' projects such as *Project BB*, seeing some accountability and positive influence on the final outcome.

4. I would like to see you developing in to the role of manager/senior of the team, including;

   a. Directly managing, mentoring and developing your QS team

   b. Undertaking project reviews to understand and have a positive influence on the risks & opportunities

   c. Demonstrating that you are working to the systems within the business and encouraging others to do the same.

5. Once you have established yourself as the Senior member of the division,

the next stage is to hold yourself out as the Commercial Lead, including;

a. Leading the division commercially from all aspects

b. Understand the business model, planning and driving the division for the future

c. Managing the Senior members of the cluster

d. Understand and influence the key risks and opportunities within your division

At your 12 month review (08 August 2017) I will undertake a more structured appraisal and assess your progress against the points above."

72 It was not suggested by the Claimant that the Respondent had any suspicion at this stage that the expected baby would suffer from any disability. The Tribunal considered that reading the contents of this email fairly and taking into account the circumstances in which it was sent, it was clearly itemising a number of aspects in which the Respondent believed that the Claimant's performance needed to improve. The Tribunal in accordance with the nature of the complaint brought, reached no view as to whether this was a reasonable position to have taken or whether it was arrived at after a proper investigation. The Tribunal considered that this note reflected the contents of a discussion which had taken place with the Claimant at a meeting in March 2017. The note was shared with the Claimant at the time. The subject matter recorded was consistent with what both parties had recorded in their contemporaneous documentation as having been discussed at the previous meeting. The Tribunal accepted that it was a description of areas particularly in relation to leadership and systems which the Respondent wished the Claimant to improve on.

73 During the course of cross-examination, it was said by Mr Steve Tucker that Mr Dan Tucker had co-written the 6 April 2017 email. The Tribunal rejected that contention. However we did not consider that it was of particular significance because the Claimant accepted that the points that were set out in that letter had been discussed. The Tribunal also took into account in assessing this evidence that the agreement with the Claimant was that he would progress through effectively two promotions over the course of a year approximately and that these would not be subject to any formal selection and recruitment process. The method by which he was to progress was outlined to the Claimant in the initial offer and discussions and was reiterated in the email of 6 April 2017. This method clearly had no regard to equal opportunities as referred to above. Although the Tribunal found that this was the way in which the Respondent was planning to progress the Claimant, the Tribunal did not thereby condone this of facilitating career progression.

74 The email of 6 April 2017 appeared to deal with two situations. The first was the recognition that the Claimant was "de facto Senior Surveyor" by then, hence the sanctioning of the pay increase. However, in the following paragraphs the Respondent made it clear that they considered that he was not fully performing all aspects of that role particularly in relation to the managerial side and also in terms of accountability and what they described as positive influence on the final outcomes of the legacy

projects.

75 Once again it was not within our remit to determine whether these were reasonable or fair ways of assessing the Claimant's performance. But it did appear to the Tribunal that this was the agreed method as of April 2017.

76 The second element of the email of 6 April 2017 was the Respondent outlining to the Claimant how they believed that he would demonstrate entitlement to progression to commercial lead (para 5).

77 There was contemporaneous documentation which indicated that the Claimant had been held out as both Senior Surveyor and Commercial Lead prior to these dates. The Tribunal considered that the Respondent took a rather cavalier approach to matters such as job titles and the picture painted to the outside world about the positions actually held by the employee.

78 Mr Steve Tucker then sent a further email to Mr Dan Tucker, not copied to anyone else, later that day at 3pm outlining some concerns or criticisms that he had in relation to the paperwork in relation to a particular contract (p.229). Whatever was the reason for raising these criticisms, because of the timing, the Tribunal did not consider that they could have been connected to the fact that the Claimant's wife subsequently gave birth to a disabled child. This was evidence of a specific contract in respect of which he was raising what appeared on their face to be genuinely-held criticisms about the process and the administration – whether or not the concerns or criticisms were well founded.

79 The next relevant piece of evidence in relation to assessing the genuineness or otherwise of the Respondent's concerns about the Claimant's performance were the minutes of the interim management meeting of the Board which took place on 21 April 2017 (pp.233-236). Mr Coy chaired the meeting and it was also attended by Grant Rayner and Kieran O'Phelan.

80 The particular minutes which were relevant to this issue were a note at 3.2(i) to the effect that: "Surveying department resources up to full capacity. PSP surveying leadership still required. ST advises that DT performance under review" (p.235). The further relevant note was at paragraph 7(i) as follows: "Salary increases in April – Dan Tucker £5k backdated to 1 January denied. NC to discuss with ST."

81 In the event, no-one discussed the matter with the Claimant and he relied on the assurance which had been given to him in the meeting which was referred to in the email of 6 April 2017 and continued to expect that he would be paid the £5,000 backdated to January 2017. When the Claimant received his payslip at the end of April he noticed that his pay had not been increased or the backdated pay paid as agreed at the meeting on 28 March. He sent a short email to Mr Tucker and copied to Mr Coy to that effect on 27 April (p.243A). The Tribunal found that neither Mr Coy nor Mr Steven Tucker responded to that email or spoke to the Claimant. The Tribunal considered that this was at the very least discourteous and possibly cowardly management.

82 This was the payment which was eventually made to the Claimant shortly before

the hearing in June 2018 and in respect of which the Tribunal made a declaration as set out above.

83 The Respondent further relied on an email dated 3 May 2017 (pp.244-245) from Mr Steve Tucker to the Claimant, Craig Bennett and Scott McGuire as part of their defence to the discrimination allegation in respect of the dismissal. The evidence was that they were all senior Quantity Surveyors within the Respondent but the Claimant worked for PSP and the other two were Quantity Surveyors on the national division. The email was also copied to Andy Lowe, Surveying Manager and Danny McGowan. Mr McGowan was said to have been the construction director.

84 The Respondent relied on this email as evidence of underperformance by the Claimant. They accepted that there was nothing in the email which made individual criticisms of the Claimant or which the Claimant should have read as such. Indeed, the Tribunal noted that the email was addressed to "Chaps" and that it followed a joint meeting with all of them on 2 May 2017. It referred to the performance of those to whom the email was addressed in relation to their "roles as cluster leaders". The Tribunal considered that the most that could be said about this email was that it indicated that the Claimant as one of the three Senior Quantity Surveyors was not demonstrating sufficient active mentoring and coaching as the Respondent would have liked or efforts to reduce risk and increase margin. There was no suggestion that Mr Bennett or Mr McGuire's contract had then subsequently been terminated.

85 Also, the Respondent and Mr Tucker had, as the Tribunal has identified, written specifically to the Claimant previously when there were concerns which affected him. The Tribunal did not consider that if the concerns had only related to the Claimant that Mr Tucker would have sent them also to Mr Bennett and Mr McGuire.

86 Mr Steven Tucker's undisputed evidence was that he was told by the Claimant in early May 2017 that his wife was pregnant. Though at this stage other than the prospect of the Claimant's wife needing to be induced in late June 2017, there was no indication of any issues of significance in relation to the baby's health.

87 The Respondent further relied on an informal meeting having taken place on 17 May 2017 at Morrison's Café between the Claimant and Mr Tucker called by Mr S Tucker in which he asked the Claimant to 'pull his socks up'. The Claimant had no recollection of such a meeting having taken place and the Respondent in closing did not rely on this as part of the evidence to support a finding. The Tribunal decided that in those circumstances we would not place any reliance on that meeting having taken place.

88 The net effect therefore was that before the baby was born at the end of May 2017, the Respondent had both to the Claimant's knowledge and without his knowledge at the board meeting, acted in a way which indicated that they had sufficiently serious concerns about his performance for them to have failed to implement a promised pay increase and also for them to have drawn the concerns to his attention and set out a plan to review those matters at the 12-month review of his employment.

89 In relation to the birth of the baby, the evidence was that the Respondent did not

place any obstructions in the way of the Claimant and indeed appeared to have had something of a light touch in terms of requiring him to account for his absence for the purposes of taking time off around the time of the birth. Furthermore, once they became aware that there were issues with the baby's health, Mr Coy told the Claimant in writing that he could have an indefinite amount of paid leave. He put no time limit on it. He expressed his devastation at the information shared with him by Mr Tucker in the email of 9 June 2017 (p.258) and asked Mr Tucker not to worry about things at work and reassured him that he needed to be with his wife and daughter.

90 In his email to Mr Coy on 9 June 2017, the Claimant set out that there were a number of serious difficulties with his baby daughter's health. Towards the end of this description he told Mr Coy that he had been led to believe that the potential causes for his new born baby's ill-health were some of the most serious that babies could have. He had informed Mr Coy in that email that the baby's birth was premature and that his daughter had had breathing difficulties and had been admitted to the intensive care unit. She had then been rushed to another hospital by an emergency team which she barely survived.

91 Having shared this information with Mr Coy, Mr Dan Tucker asked him if he could just tell people that his daughter was unwell or "something a bit vague" as the situation was still ongoing. He asked for some help like unpaid leave and Mr Coy's response as set out above was to grant him paid leave indefinitely.

92 The Tribunal also noted that the tone of Mr Coy's email response on 10 June 2017 to the Claimant's email of 9 June was extremely supportive and friendly.

93 There was no evidence before the Tribunal that the Respondent chased the Claimant in any way during this period of paid leave or put any pressure on him to return. The Claimant then arranged to return to work and did so on 10 July 2017 [C1 para 78].

94 The Tribunal considered this evidence was highly suggestive therefore of the Respondent not behaving in a negative or unfavourable way towards the Claimant by virtue of his being a new father or of his having to take time off work to spend with his family because of his new baby's ill-health.

95 Before the Claimant's return to work on 10 July, the baby had been transferred to Great Ormond Street Hospital on 15 June 2017. She remained under the care of the Great Ormond Street Hospital for the remainder of her life. She was certainly still admitted at the hospital at the time of the dismissal of the Claimant on 20 September 2017.

96 A further point was relevant in relation to the Respondent failing to pay the Claimant his pay rise at the end of May. In a text message to Mr Tucker informing him about the fact that his wife was in hospital in labour (p.257), Mr Dan Tucker also added a postscript telling Mr Steve Tucker that he had checked his payslip and that no pay rise or backdated pay had been given to him again. The Respondent failed to respond to this text message either. The Tribunal disagreed with Mr Taheri's submission that this was: "an understandable admission in circumstances where the Claimant's text message itself stated that the Claimant would be off the grid for a bit". For the reasons

set out above the Tribunal did not consider that this was evidence of any discriminatory mindset not least because also at this point there was no knowledge about the disability of the Claimant's daughter. However, in a company which considered itself to be "people friendly" the failure to address this point as the Tribunal has stated above had a discourteous and/or cowardly air to it.

97 The Tribunal accepted the Claimant's account of his routine once he had returned to work from 10 July 2017 until his dismissal on 20 September 2017 as set out in paragraph 79 of his witness statement in particular. This involved what must have been quite a punishing schedule, whereby the Claimant returned home each evening to bathe his two year old son and put him to bed as his wife was living at the hospital with their new born daughter during the week. He was able to continue with his work because there was support available from his son's grandparents who would look after their son until the Claimant got home in the evening.

98 He described that on a Thursday evening he would pack a bag of clothes for the weekend and then after work on Friday he would return home to bathe his son, put him to bed and then travel to London to take over from his wife at the Great Ormond Street Hospital until Sunday evening while she returned home to spend time with their son.

99 There was no evidence before the Tribunal that prior to the termination of his employment and the discussions with the Claimant on the subject which started on 14 September, that anyone had raised any concerns with him about this routine or had questioned whether on a Friday evening he had waited until after work before taking up his domestic duties. The suggestion in the Respondent's case was that information came to the attention of Mr Steve Tucker to the effect that the Claimant was not doing his work on a Friday afternoon and was going straight to the hospital. The Respondent's managers were quite open in the Tribunal in saying that the concern was that the Claimant had not discussed this matter with them or been open about this. However, as the Tribunal stated it was apparent that they did not question the Claimant about this at the time.

100 The Tribunal was satisfied that the Claimant was committed to his job and felt under a duty to perform as much of his job as he could. He described in his witness statement that he missed not only pregnancy scans and antenatal appointments but also trips to the hospital when his wife was being monitored and assessed prior to his daughter's birth. He also described missing a number of important events in the life of his new baby once he had returned to work. The Tribunal noted however that he did not suggest that he had asked for time off to attend these appointments and had been refused.

101 The date for the review of the Claimant's performance after a year came and went on 8 August 2017. The next that he was aware of this was an email from Mr Tucker to him (p.294) dated 14 September 2017 inviting him to a performance review. He stated:

> "For one reason or another your 12 month review slipped last month. Please can you attend a performance review meeting tomorrow at 12 noon with myself and Neil."

102 There was a dispute as between the Claimant on the one hand and Mr Steve Tucker and Mr Neil Coy on the other as to whether the Claimant had made them aware of the degree of seriousness of his baby daughter's health condition. Mr Hummerstone gave evidence on this issue in support of the Claimant to paint a picture of the Claimant being quite open with his work colleagues once he had returned to work about the difficulties that both he and baby were facing.

103 In the Claimant's witness statement, he described detailed conversations that he had had with various members of staff of the Respondent about his daughter's condition including with Mr Steve Tucker. But he did not describe such a conversation with Mr Coy.

104 In describing the conversation with Mr Tucker, he described going into detail about his daughter's condition and the road ahead and that Mr Steve Tucker got slightly emotional and shared with him that he had experience of a situation in which a young child had tragically lost his life due to ill-health.

105 In his witness statement (para 31) Mr Tucker described having been given a less severe picture than that described by the Claimant. The Claimant disputed that this was accurate i.e. that he had told Mr Tucker the information that Mr Tucker set out in his witness statement.

106 The Tribunal considered that it was quite possible that although the Claimant had raised certain aspects of his daughter's condition with both Mr Tucker and Mr Coy, that their recollection of the detail would not necessarily have been clear.

107 The Tribunal reminded itself also that we had already concluded that the Respondent had brought genuinely held concerns about the Claimant's performance to his attention prior to the Claimant's return to work.

108 In paragraph 16(c) of the Ground of Resistance the Respondent stated as an example of support provided by them for the Claimant in relation to caring for and parenting his ill daughter that it exercised its discretion not to discipline the Claimant in circumstances where he failed to attend sites in London and visited Eva at the hospital instead (which they believed regularly occurred on Fridays).

109 It appeared that this information was brought to Mr Tucker's attention by John Wynne, the Delivery Lead of PSP. In his witness statement Mr Tucker described (para 32) that in the weeks following the Claimant's return to work, he was aware that he would leave early on a Friday to attend project "BB" and then go to Great Ormond Street to visit his wife and daughter.

110 The Respondent's position was that there was nothing wrong with the Claimant doing this. However, Mr Tucker continued that it was then brought to his attention by John Wynne that the Claimant was not going to the project BB site at all on a Friday afternoon. Mr Steve Tucker's case was that he decided not to raise this with the Claimant. He indicated that if he had known the severity of the situation he would have told the Claimant not to worry about work and to take any time he needed.

111 In his oral evidence Mr Coy indicated that he was very disappointed by the

Claimant conducting himself in this manner as he understood it. As we said above the Respondent did not ever ask the Claimant about this in order to clarify the position. It appeared from his oral evidence that Mr Coy found out about the belief that the Claimant was not going to the project BB site on a Friday afternoon a matter of days before the Claimant was called to the meeting on 15 September 2017.

112 The Tribunal considered that this approach to perceived failings on the Claimant's part and a failure to communicate with him about it was consistent with the Respondent's earlier conduct in terms of not giving the Claimant a pay rise that they had agreed with him face to face and then failing to respond to two communications by him as to why he had not received his pay rise.

113 In the witness statements Mr Steve Tucker raised a few incidents which he put forward to the Tribunal as examples of the Claimant not fulfilling his role at the appropriate level. These covered the timeframe from July through to 5 September (pp.241), (pp.264), (p.275) and (p.293).

114 Given that the Claimant had been on paternity leave and extended compassionate leave until 10 July 2017, and given the nature of the contemporaneous correspondence about the recruitment of Adam Campbell, the new Quantity Surveyor, the Tribunal did not consider that it was fair or appropriate to criticise the Claimant for failing to take responsibility in relation to this. The Tribunal did not consider that the contemporaneous documentation (especially p.238) indicated that there was any concern with the Claimant's performance in relation to this issue specifically prior to the birth of his baby (pp.239 and 241). It appears that although Mr Campbell started on 10 July 2017, the same date as the Claimant returned to work, the criticisms made by Mr Tucker at para 34 of his statement about the Claimant's involvement in the recruitment process related to a period in April 2017. However as indicated above and as evidenced by the last email of 26 April 2017 from John Wynne to Mr Coy, Mr Tucker, the Claimant and others, there was no apparent criticism of the Claimant. The process of recruitment of Mr Campbell was simply progressing, with the senior managers, namely Mr Coy and Mr Barr, dealing with the final interviews.

115 The 25 July 2017 issue in relation to project BB involved an email from Mr Steve Tucker to the Claimant which was also addressed to others but the body of it was addressed only to Mr Tucker. Mr Steve Tucker asked Mr Dan Tucker to: "Please take ownership of this and choose the course of action that you believe is appropriate …" In his witness statement Mr Steve Tucker indicated that this matter had not been appropriately resolved and the Claimant requested that the extension of time application be passed on to an external consultant.

116 The Tribunal did not consider on the balance of probabilities that the evidence put forward about this issue supported the contention that at the time, the Respondent saw this as a failing by the Claimant to take positive action.

117 The next example given by Mr Steve Tucker was reliance on an email of 16 August 2017 to John Wynne and the Claimant (p.275) regarding what he saw as a poor deal that they had reached on the settlement claim for project "HH" that left the company exposed.

118 In fact, although the email was indeed sent to both Mr Wynne and Mr Tucker, and copied to Mr Coy, the body of the email was addressed to John Wynne. The Tribunal did not consider that the content of this email supported the criticisms made by Mr Steven Tucker in his witness statement (para 36) that the Claimant had not used his appropriate experience and qualification to deal with the situation and that he had left it to John Wynne to negotiate the deal despite it falling firmly within the Claimant's remit.

119 The final one of these other examples was at p.293. On 5 September 2017 Mr Tucker described sending an email to the PSP division highlighting the "lingering issues" that needed to be resolved. Once again, the Tribunal found that the Claimant was but one of a number of recipients, including Mr McGuire and Mr Bennett as before. It was copied to even more people. It followed a project review meeting which had taken place on 5 September 2017 and was addressed to "Gents". There was no individual reference to the Claimant in the content of that email at all. The Tribunal considered that this example and the earlier ones were matters which the Respondent had dredged up subsequently.

120 Mr S Tucker's position was that he met with Mr Coy to discuss the Claimant's performance after the project review meeting on 5 September 2017 (para 37 of ST statement). There was no contemporaneous record of this. Also, Mr Coy did not describe this meeting in his witness statement.

121 Mr Tucker also described having concerns in August 2017 about whether the Claimant was appropriately fulfilling his supervisor/line manager duties in respect of one of the Quantity Surveyors. He described making enquiries of others about their impression of whether the Claimant was fulfilling this duty but confirmed that he did not address these concerns to the Claimant. He also indicated that he did not speak to Mr Hummerstone, but explained that this was because he was aware there was a close relationship between Mr Hummerstone and the Claimant. The Tribunal has already indicated that this sort of approach to management is not consistent with fairness or ensuring that accurate decisions are made about the performance of a member of staff. However, there is a difference between that and concluding that this approach was a symptom of a discriminatory attitude.

122 The Respondent's two managers Mr Coy and Mr S Tucker then met with the Claimant on 15 September 2017 for the 12-month review meeting.

123 The Claimant and Mr S Tucker gave their accounts of the meeting at paragraphs 92 and 39 of their respective statements. There was no contemporaneous note of the meeting. The Tribunal accepted the Claimant's description that he was told that this was an "off the record chat".

124 The Tribunal found that the Respondent's managers put to the Claimant in that meeting their criticisms as set out in particular the witness statement of Mr Coy at paragraph 37, namely: -

124.1 That they believed that the Claimant had had no positive impact and had taken no accountability or responsibility for legacy projects such as project BB;

124.2 That the Quantity Surveyors and the team had not received any time from the Claimant to manage, mentor or develop them;

124.3 That the Claimant was not in touch with the team's projects and was not having a positive influence on the risks and opportunities within the business which contributed to its margin;

124.4 That the Claimant was consistently failing to follow the company's procedures and/or demonstrate competent use of its systems.

125 Having run through these points with the Claimant the Tribunal considered that it was likely that the managers put to the Claimant that in effect he could take the course of resigning or remain and face a formal performance review. The Claimant's position was that the Respondent had not provided any specific examples of these alleged criticisms of his work and therefore he believed he had done nothing wrong and that he would not resign. We also found that Mr Coy and Mr Tucker told him to go home and return for another performance review meeting on 18 September 2017, the following Monday.

126 In paragraph 39 of Mr Coy's statement he appears to corroborate the Claimant's description and the Tribunal's finding about the meeting of 15 September 2017.

127 The meeting on 18 September 2017 appears to have been a further attempt by the Respondent to obtain the Claimant's resignation rather than to go through a formal process. There were no notes of the meeting on Monday 18 September either. The Claimant made contemporaneous notes after the meeting (p.300).

128 The meeting on Monday 18 September took place between 9:45 and 10:15am (p.300). Very shortly thereafter (p.302) at 10:36am, Mr Coy sent to the Claimant by email an invitation to a performance review meeting which was scheduled to take place on Wednesday 20 September 2017 at 3pm. Mr Coy attached a letter to the email (p303) setting out the reason for the meeting on 20 September. He referred to past appraisal meetings and informal discussions in which there had been some concerns regarding the Claimant's performance at work. He believed that there had not been the desired improvement in the Claimant's performance that was necessary for the role he occupied or for the business overall. He informed the Claimant that he could bring a union representative, a workplace colleague or friend to the meeting.

129 In his email confirming attendance sent by the Claimant also on 18 September 2017 (p.301), he confirmed that he would not be bringing anyone with him to the meeting on 20 September and recorded that he had been instructed to go home following both the meeting on Friday 15 September and the morning meeting on 18 September. That assertion was not contradicted by the Respondent.

130 The Tribunal also had a note which had been prepared by Mr Coy in advance of the meeting on 20 September (p.304) setting out the issues that he wanted to raise at that meeting. Mr Coy also frankly admitted that he had made up his mind as to the outcome prior to the meeting. This was most clearly demonstrated by the fact that the note of points that he wanted to raise at the meeting ended with the following entry:

> "Not working out – no reasonable prospect that things will improve
> I am therefore terminating your employment with immediate effect."

131 The Claimant also made a contemporaneous handwritten note of the meeting of 20 September 2017 (pp.305-307). He corroborated the points made by the Respondent in the witness statement referred to above (para 37 of Mr Coy's statement) i.e. that these matters were discussed in the meeting of 20 September and that Mr Coy and Mr Tucker referred back to the discussion on the previous Friday and to the points highlighted in the 6 April appraisal.

132 Mr Dan Tucker's note records that he was told that management believed they had been talking about the issue of the lack of senior management to take on responsibility for a while and that they had endured the position (with the Claimant) because they were genuinely sympathetic. They expressed the view that perhaps in a few years the Claimant would be in a position to take up that responsibility but that they could not wait that long.

133 Once again, the Claimant stated his position which was that he did not think he had done anything wrong and that it was just a "culture clash". The Claimant noted himself as having said that there was nothing professionally wrong but that "we aren't going to get along going forward". The Tribunal considered that this was close to the truth of the situation.

134 There was no dispute that the Claimant was formally dismissed at the end of that meeting.

135 Ms Calver was present as a note-taker at the meeting of 20 September on behalf of the Respondent. (The notes that Ms Calver made were at pages 313 to 314.)

136 The Respondent wrote confirming the dismissal by a letter dated 20 September 2017 (p.308). As stated above the Claimant was dismissed with immediate effect with two weeks pay in lieu of notice. The letter in the first paragraph stated that he was dismissed by the Respondent after consideration of the points discussed during the meeting because the Respondent felt that the Claimant was unable to fulfil what they expected of a Quantity Surveyor.

137 The Tribunal considered that it was disingenuous of the Respondent to describe the Claimant as a Quantity Surveyor in this termination letter given that on any view they had told him that he was de facto Senior Quantity Surveyor as long ago as April 2017.

138 The Claimant then instructed solicitors who presented a letter of appeal against dismissal (pp.315-317).

139 In the letter of dismissal, the Claimant was informed about his rights to appeal if the appeal was submitted within five days of receipt of the letter of 20 September 2017 which was sent by post and email.

140 In the letter of appeal, Messrs Quantrills, the Claimant's solicitors, made

reference to the fact that they had been instructed to commence ACAS early conciliation with a view to bringing Employment Tribunal proceedings for disability discrimination if conciliation was not successful. They also outlined the money claims that might be being brought.

141 Mr Coy responded by saying that he would wait for contact from ACAS to discuss the matter further.

142 Mr Coy also offered to write a reference for the Claimant and to assist him in finding another job (para 44 of Coy statement). This was not contradicted by the Claimant.

143 It appears that there was no separate consideration of the appeal and that the conciliation process under the auspices of ACAS then took over.

144 The Tribunal had to consider whether the reason for the dismissal was related to the Claimant's daughter's disability or whether it was as the Respondent indicated because they did not consider that the Claimant was the right fit for their business and that he had not particularly been taking forward the issues of management and guidance and mentoring of the other surveyors to the extent that they had anticipated.

145 We have already found that the company did not always take a structured approach to concerns that they were having about the Claimant's performance by putting these matters to him contemporaneously. Given that they were aware that the Claimant had very pressing issues on a personal level this situation was regrettable. However, the Tribunal reminded itself that this was not an unfair dismissal complaint but a complaint alleging discrimination.

146 The only issue which expressly appeared to connect the termination of the Claimant's employment with the facts of the Claimant's daughter being unwell was the suggestion in the ET3 about the Respondent not taking disciplinary action against the Claimant in relation to his not attending work on Friday afternoons. We considered that this assertion confirmed that the Respondent believed that the Claimant was not fulfilling his work duties on Friday afternoons. The evidence was that this was seen as a breach of trust, given that the Claimant had not asked for the time off. The Respondent's failure to address this with the Claimant and possibly obtain confirmation that he had <u>not</u> been doing this, was consistent with their conduct towards him before they had knowledge of his baby's ill health in early June 2017.

147 Given the chronology, the Tribunal did not consider that the Respondent decided to dismiss the Claimant because he had a commitment to his daughter going forward.

148 The Tribunal considered the evidence in general very carefully and reminded itself that there was evidence that the Respondent perceived that the Claimant was not fulfilling certain important aspects of the leadership role that they had anticipated him fulfilling and that these concerns predated the birth of the Claimant's baby. The Tribunal also took into account the Claimant's own description of the final meeting on 20 September 2017 in which he appeared to acknowledge by his own words that he had not been a good "fit" for the role that the Respondent anticipated. This did not

mean to say that he was in any way a poor Quantity Surveyor or indeed Senior Quantity Surveyor but that he did not fit into the Respondent's company set up and culture. The Claimant himself used the expression "culture clash".

149 The Tribunal considered therefore that in all the circumstances the discriminatory dismissal complaint under the Equality Act 2010 was not well-founded and was dismissed.

150 Happily, the Claimant obtained new employment on 23 October 2017 (p.6). His evidence was that he was able to work more flexibly in his new employment and they were very understanding of the Claimant's personal situation.

151 There was no claim for loss of earnings going forward so it appeared likely that he was paid in the new job at the same rate or higher than the rate at which he had been paid when with the Respondent.

Employment Judge Hyde

16 October 2018